Nos. 37 and 45

In the Supreme Court of the United States

OCTOBER TERM, 1944

TOM TUNSTALL, PETITIONER

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, OCEAN LODGE NO. 76, PORT NORFOLK LODGE NO. 775, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BESTER WILLIAM STEELE, PETITIONER

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, AN UNINCORPORATED ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

These cases raise issues as to the interpretation of the majority rule provisions of the Railway Labor Act. This brief is presented because of the importance of these questions to the administration both of that statute and of the National

Labor Relations Act, which contains similar provisions.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Fourth Circuit in the *Tunstall* case (No. 37, R. 55–59) is reported in 140 F. (2d) 35. The opinion of the Supreme Court of Alabama in the *Steele* case (No. 45, R. 131–144) is reported in 16 So. 2d 416.

QUESTIONS PRESENTED

The questions considered in this brief are:

1. Whether, under the Railway Labor Act, a labor organization acting as representative of a craft or class, while it so acts, is under an obligation to represent all the employees of the craft without discrimination because of their race.

2. Whether the courts have jurisdiction to protect a minority of a craft or class against a violation of the above obligation.

STATUTES INVOLVED

The statute primarily involved is the Railway Labor Act, 48 Stat. 1185, 45 U. S. C., Sections 151 *et seq.* Its pertinent provisions, as well as those of the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. Sections 151 *et seq.*, are set forth in the Appendix (*infra*, pp. 50–54).

STATEMENT

Although these cases come from different courts, their facts are substantially the same and

they present the same issues on the merits. Since motions to dismiss the complaints were sustained in each case, the facts are those alleged by the petitioners.[1]

Petitioner in each case is a Negro locomotive fireman, suing in his own behalf and as representative of the Negro firemen as a class (No. 37, R. 5; No. 45, R. 84). A majority of the firemen on each of respondent railroads are white, and are members of the respondent Brotherhood of Locomotive Firemen and Enginemen,[2] but a substantial minority of the firemen are Negroes (No. 37, R. 6; No. 45, R. 83). Respondent railroads have dealt with the Brotherhood as the exclusive collective bargaining representative of the craft of firemen under the Railway Labor Act and petitioners and other Negro firemen have been required to accept the Brotherhood as their representative for the purposes of the Act (No. 37, R. 6–9; No. 45, R. 86–87), although the constitution and ritual of the Brotherhood exclude Negroes from membership solely because of race (No. 37, R. 6; No. 45, R. 83).

On March 28, 1940, the Brotherhood, purporting to act as representative of the entire craft of firemen under the Railway Labor Act, served a notice on 21 railroads in the southeastern portion

[1] In No. 45 the facts are taken from the "substituted amended complaint" (No. 45, R. 83–97).

[2] Other respondents are locals and members of the Brotherhood (No. 37, R. 2, 5; No. 45, R. 83–85).

of the country of its desire to amend the existing collective bargaining agreements covering firemen so as to drive Negro firemen completely out of service (No. 37, R. 8, 14–15; No. 45, R. 88–89, 59–60).[3] On February 18, 1941, the railroads entered into an agreement with the Brotherhood as the exclusive representative of the craft which provided that not more than 50 percent of the firemen in each class of service (freight, pas-

[3] The proposal was that only "promotable," (*i. e.*, white) men could be employed as firemen, or assigned to new runs or jobs, or permanent vacancies in established runs or jobs (No. 37, R. 14–15; No. 45, R. 59). The "Summary, Findings and Directives" of the President's Committee on Fair Employment Practice, relating to the "Southeastern Carriers Conference" or "Washington" Agreement (November 18, 1943, mimeograph p. 4), in describing the effect of these proposals, stated that if the carriers had agreed to them "it is clear that Negro firemen would have been rapidly eliminated. Being non-promotable, no more could have been employed and those already on the rosters could not have survived the proscription against their assignment to new runs and permanent vacancies."

Acting under authority of the Presidential Executive Order 9346, issued May 27, 1943, the President's Committee on Fair Employment Practice, conducted a public hearing in which it considered complaints filed by Negro firemen attacking the Southeastern Carriers Conference agreement as discriminatory and in violation of the Executive Order. On November 18, 1943 the President's Committee issued its "Summary, Findings and Directives" relating to the "Southeastern Carriers Conference" or "Washington" Agreement in which it directed the carriers and the railroad brotherhoods to set aside the agreement of February 18, 1941 and to cease discriminatory practices affecting the employment of Negroes. These "directives" have not been obeyed or complied with.

senger, etc.) in each seniority district should be Negroes, that until such percentage was reached all new runs and all vacancies should be filled by white men, and that Negroes should not be permitted employment in any seniority district in which they were not working (No. 37, R. 8–9, 16–17; No. 45, R. 89–90, 10–13). The agreement reserved the right of the Brotherhood to press for further restrictions on the employment of Negro firemen on the individual carriers (No. 37, R. 18; No. 45, R. 13).[4] In No. 45, on May 12, 1941, the

[4] The President's Committee on Fair Employment Practice (*op. cit.*, note 3), described the effect of this agreement as follows: "Under the agreement finally entered into, it is apparent that the situation is only slightly less serious than that intended to be created by the Brotherhood. In the first place, according to the Agreement, white firemen are virtually guaranteed at least 50 percent of the jobs in each class of service, regardless of seniority, whereas there is no floor whatever under the number of Negro firemen. Secondly, the Agreement ended the employment of Negro firemen wherever they exceeded 50 percent. The ban against such employment has not been removed, even though their numbers are now below 50 percent of the total, and despite the existing firemen shortage. The carriers and the union have preferred to struggle along with insufficient and inexperienced men rather than utilize the services of experienced Negro firemen ready and willing to work. Thirdly, the Agreement sanctions prior contracts in force on some roads under which employment of Negro firemen is more severely restricted or has been eliminated entirely. One example is the Southern Railway Agreement which, depending on the District involved, limits Negro firemen to proportions ranging from 10 percent to 50 percent. Another is the St. Louis-San Francisco Agreement of 1928 which flatly prohibits their employment altogether. Fourthly, the percentage rule and the pro-

Brotherhood negotiated a supplemental agreement with the Louisville & Nashville Railroad Company further curtailing Negro firemen's seniority rights and restricting their employment (No. 45, R. 90, 13–21).

The complaints allege that in serving the notice of March 28, 1940, and in entering into the contract of February 18, 1941, and subsequent contracts, respondent Brotherhood, "maliciously intending and contriving to secure a monopoly of employment and the most favorable jobs for its own members, acted in fraud of the rights of plaintiff and the other Negro firemen and failed and refused to represent them fairly and impartially as was its duty as their representative under the Railway Labor Act" (No. 37, R. 9–10; cf. No. 45, R. 88–90).

It is also alleged that the Negro firemen were not given notice or opportunity to be heard with respect to any of these agreements, and that there was no disclosure of the existence of these agreements to the Negro firemen until they were put into effect to petitioners' detriment (No. 37, R. 9–10; No. 45, R. 88, 90).

In No. 37, as a result of the agreement, the

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vision relating to vacancies and new runs have so greatly impaired the seniority rights of Negro firemen and inflated those of junior white firemen that the better jobs have become or are rapidly becoming the monopoly of white firemen. Consequently, Negroes have been and are being relegated to the lowest paid, least desirable jobs, to part time work and to extra or even emergency status."

Brotherhood, it is alleged, acting as representative of the craft of firemen, induced and forced the railroad to deprive petitioner Tunstall of his job, although he was serving to the satisfaction of the railroad as a fireman on an interstate passenger run, and to assign his job to respondent Munden, a member of the Brotherhood (No. 37, R. 10–11).[1] Tunstall was assigned to a more arduous and difficult job with longer hours, in yard service (No. 37, R. 11). He requested the railroad to restore him to his prior position, but the carrier asserted that under the Railway Labor Act it could not do so unless the Brotherhood as his representative made the request (No. 37, R. 11). Tunstall then requested the Brotherhood to represent him for the purpose of having his assignment restored, but the Brotherhood refused even to acknowledge his request (*ibid.*).

In No. 45, although Negro firemen constitute a minority of the firemen on the Louisville & Nashville system, they comprised a majority in the passenger district on which petitioner Steele was employed (No. 45, R. 86). Until April 8, 1941, he was in a "Passenger Pool" to which five Ne-

[1] Tunstall had been assigned to the run in June 1941, after the white fireman previously assigned to it had taken another assignment. Inasmuch as there was only one other fireman, a Negro, in passenger service in that district, this shift gave colored firemen over 50 percent of the jobs in the district. On October 10, 1941, the Brotherhood, relying on the agreement, caused the railroad to remove Tunstall from the job and to assign it to Munden (No. 37, R. 10–11).

groes and one white fireman were assigned (No. 45, R. 91–92). These jobs were highly desirable from the point of view of wages, hours, and other considerations, and Steele was performing his work satisfactorily (*ibid.*). Following a change in the mileage covered by the pool, all jobs therein were declared vacant, on or about April 1, 1941, and the Brotherhood and the railroad, acting under the agreement, disqualified all the Negro firemen and replaced them with four white men, members of the Brotherhood, all junior in seniority to petitioner[6] and no more competent or worthy (No. 45, R. 92). As a consequence, it is alleged, petitioner was completely out of work for 16 days, and then was assigned to more arduous, longer, and less remunerative work on local freight (No. 45, R. 93). He was subsequently replaced by a Brotherhood member junior to him, and assigned to work on a switch engine, which was even harder and less remunerative, until January 3, 1942, on which date he was reassigned to passenger service (*ibid.*). In this case also petitioner appealed for relief and redress to the railroad and the Brotherhood without avail (No. 45, R. 93–94).[7]

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[6] Steele's seniority dated from 1910, and that of the other colored firemen from between 1917 and 1922. The seniority of the four white firemen ran from 1917, 1925, 1940, and 1940, respectively (No. 45, R. 92).

[7] The original bill in the instant case was filed August 30, 1941 (No. 45, R. 3).

In each case it was alleged that the Brotherhood has claimed the right to act, and has acted, as exclusive representative of the firemen's craft, and that in that capacity the Brotherhood has an obligation and duty to represent the Negro firemen impartially and in good faith (No. 37, R. 6–7; No. 45, R. 87–88), but that it has been hostile and disloyal to the Negro members of the craft and has deliberately discriminated against them and sought to drive them out of employment (No. 37, R. 7–10; No. 45, R. 88–90), and that the right of petitioners and other Negro firemen "to be represented fairly and impartially and in good faith * * * under the Railway Labor Act * * * has been violated and denied" (No. 37, R. 12; No. 45, R. 87–88).

In each case petitioner prayed (1) for an injunction against enforcement of the agreements made between the railroad and the Brotherhood insofar as they interfere with the petitioner's rights; (2) for an injunction against the Brotherhood and its officers acting as representatives of petitioner and others similarly situated under the Railway Labor Act so long as the discrimination continued; (3) for a declaratory judgment as to their rights, including a declaration that the Brotherhood is under obligation to represent all members of the craft of firemen, including Negroes, fairly and without discrimination; and (4) for damages sustained by reason of the Brother-

hood's wrongful conduct (No. 37, R. 4, 12–13: No. 45, R. 96–97).*

In No. 37, petitioner Tunstall filed his complaint in the United States District Court for the Eastern District of Virginia (No. 37, R. 1–24), and in No. 45, petitioner Steele filed his original bill of complaint (No. 45, R. 3–21) and substituted amended complaint (No. 45, R. 83–98) in the Alabama Circuit Court of Jefferson County. Motions to dismiss and demurrers in each case (No. 37, R. 25–35; No. 45, R. 21–27, 98–122) were sustained by the trial courts (No. 37, R. 36–48; No. 45, R. 124–126), and these rulings were upheld on appeal by the courts below (No. 37, R. 59–60; No. 45, R. 131). In No. 37 the Circuit Court of Appeals for the Fourth Circuit declared that it had "considered whether jurisdiction might not be sustained for the purpose of declaring the rights of plaintiff to the fair representation for the purposes of collective bargaining which is implicit in the provisions of the National Railway Labor Act" (No. 37, R. 56), but felt bound to hold that it had no jurisdiction in view of decisions of this Court during the last term (No. 37, R. 55–59).† In No. 45 the Supreme Court of Ala-

* In No. 37 Tunstall also sought the restoration of the job to which he was entitled (No. 37, R. 13).

† *Brotherhood of Railway & Steamship Clerks* v. *United Transport Service Employees*, 320 U. S. 715, 816; *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297; *General Committee* v. *Missouri-Kansas-Texas R. Co.*, 320 U. S. 323; *General Committee* v. *Southern Pacific Co.*, 320 U. S. 338.

bama held that it had jurisdiction over the controversy, but found on the merits that no cause of action was stated (No. 45, R. 131–144).

SUMMARY OF ARGUMENT

I

The right of the organization chosen by the majority to be the exclusive representative of a bargaining unit exists only by reason of the Railway Labor Act. Implicit in the grant of such right is a correlative duty of the representative to act in behalf of all the employees in the unit without discrimination. Congress would not have incapacitated a minority or an individual from representing itself or his own interests without imposing upon the craft representative a duty to serve on behalf of the craft as a whole, and not merely for the benefit of certain portions of it favored as a result of discrimination against others.

The terms of the statute and its history support this interpretation. The word "representative" normally connotes action on behalf of those to be represented. The Act fulfills its purpose of peacefully settling disputes on a voluntary basis only when the employees have confidence that their representative in the negotiations is acting in their interest. And the Congress which incorporated the principle of majority rule in the Railway Labor Act and the National Labor Relations Act believed that, although the minority was

deprived of separate representation, it was not harmed inasmuch as it was to receive all the advantages which the majority obtained for itself. Clearly Congress did not intend the grant of exclusive authority to a representative to result in discrimination against individuals or minorities.

Upon the allegations in the complaints in these cases, the Brotherhood has entered into and is enforcing agreements which discriminate against the Negro firemen because of their race. This discrimination in the Brotherhood's conduct as representative is aggravated by its refusal to admit the colored firemen to membership, so that they do not have the protection which would flow from participation in the formulation of union policy. In these circumstances, the Brotherhood is obviously not acting in good faith as the representative of the entire craft. This does not mean that a labor union as a private organization has no power to fix its own membership requirements. But when it seeks to exercise the exclusive statutory right, it must carry out the obligation to represent fairly which is inherent in that right.

II

The courts have jurisdiction to enjoin a union from acting as statutory representative so long as it fails to act without discrimination on behalf of all the members of the craft. The present cases are distinguishable from those decided at the last term in that none of the processes for conciliation,

mediation or arbitration and none of the administrative machinery established is available to safeguard minorities against discrimination by the majority. We do not think that Congress intended that a minority should be completely helpless in case of disregard by the statutory representative of its duty to act in behalf of the entire craft. In addition, the cases may be brought within the exception created by the *Texas & New Orleans* and *Virginian* decisions, (1) inasmuch as the duty to represent without discrimination is inherent in the doctrine of majority rule on which the statutory scheme rests, and this duty would be meaningless if the courts are denied jurisdiction to enforce it, and (2) to the extent that relief is sought against an employer for bargaining with an organization which, by reason of its discrimination, is not entitled to represent the craft. Furthermore, if the Act should be construed as depriving a minority of its right to self-representation without imposing an enforcible duty on the craft representative to act in good faith on behalf of the minority, a constitutional question would arise which would not be subject to the limitations set forth in the cases decided at the last term.

ARGUMENT

The issues presented by the instant two cases are closely related to those before this Court in *The Wallace Corporation* v. *National Labor Relations Board* and *Richwood Clothespin & Dish*

Workers' Union v. *National Labor Relations Board*, Nos. 66 and 67, this Term. In all four cases the basic issue is whether federal legislation, providing that a labor organization selected by the majority of employees in a unit shall be the exclusive bargaining representative, vests in the labor organization power to enter into a collective bargaining agreement under which the employer is required, on agreement sought by the labor organization, to discriminate against a minority group of employees within the unit whom the labor organization refuses to admit to membership. Equally applicable to all four cases is the related legislative history of the two Acts under which the respective cases arise, the Railway Labor Act and the National Labor Relations Act.

These cases differ from the *Wallace* cases, however, in that the discrimination here practiced was solely because of race whereas in the *Wallace* cases it was because of prior union affiliation. Unless the Railway Labor Act be construed so that the broad powers it vests in labor unions are held to be subject to the implied limitation that they cannot be used to discriminate because of race,[10] constitutional issues are presented. These

[10] For discussions of the Negro problem on the railroads, see Northrup, Herbert R., *Organized Labor and the Negro* (Harper & Bro., 1944), pp. 48–101; Spero, Sterling D., and Harris, Abram L., *The Black Worker* (Columbia University Press, 1931), pp. 284–315; Cayton, Horace R., and Mitchell, George S., *Black Workers and the New Unions* (University of North Carolina Press, 1939), pp. 439–445.

cases also differ from the *Wallace* cases in that they involve no question, as to the closed-shop. The Railway Labor Act, which contains no proviso similar to Section 8 (3) of the National Labor Relations Act, prohibits both closed and preferential shop agreements. Sec. 2, Fourth and Fifth; see 40 Op. A. G. No. 59, December 29, 1942.

I. The Railway Labor Act Imposes Upon the Representative of a Craft the Obligation to Represent All the Employees Within the Craft Without Discrimination Because of Race

A. The Right and Power of the Representative Designated by a Majority of the Employees in a Craft or Class to Act as the Exclusive Representative of All the Employees in the Craft or Class are Derived from the Statute

The Railway Labor Act provides (Section 2, Fourth):

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. * * *

Section 2, Second, and Section 2, Ninth, require carriers to bargain with the representative so chosen as the representatives of the employees of

the craft or class." It is established that such a representative has the exclusive right to bargain collectively on behalf of all the members of the craft. *Virginian Ry. Co.* v. *System Federation,* 300 U. S. 515.

This right and power are a statutory creation. They differ materially from rights or powers which unions derive from employee designations, in the absence of statute, by operation of common law principles of agency. The statutory representative enjoys, in addition, the power to act for all the employees in the craft or class, irrespective of membership or individual authorization, with respect to "all disputes concerning rates of pay, rules, or working conditions" (Section 2) between the carrier and the employees. At the same time, because the carrier is under a duty "to treat with no other" representative (*Virginian Railway* case, 300 U. S., at p. 548), any union designated by a minority loses the right which it would have had

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[11] Section 2, Second, reads as follows:

"All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

Section 2, Ninth, authorizes the National Mediation Board to resolve representation disputes by certifying the majority choice of the employees, and provides further that:

"Upon receipt of such certification the carrier shall treat with the representatives so certified as the representative of the craft or class for the purposes of this Act. * * *"

under the common law to act in accordance with the authorizations which it has received. An adumbration of the extent to which the statute departs from the common law appears in the recent decisions of this Court in *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 342; *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, and *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678. It was held in these cases that, after the majority has chosen a representative, the minority cannot bargain through anyone else and cannot even bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining.

In holding in the *O. R. T.* and *Case* decisions that the benefits and advantages of collective action are available to each employee and cannot be forfeited by him through individual negotiations, this Court also recognized the necessary corollary, that where the majority "collectivizes the employment bargain," the individual must give up hope of securing for himself better conditions than those secured for him by the statutory representative (*Case* decision, 321 U. S. at pp. 338–339). And in the *Medo* case it held that even before the representative has entered into any contract, individuals or groups of employees may not bargain directly with the employer. Thus the statutory grant of power to the representative designated by the majority deprives individuals or minority

groups of the right to negotiate as to their conditions of employment which they would otherwise have possessed.[12]

B. THE RIGHT TO BE EXCLUSIVE REPRESENTATIVE IMPLIES A DUTY TO ACT ON BEHALF OF ALL EMPLOYEES IN THE UNIT WITHOUT DISCRIMINATION.

Implicit in the grant to the organization chosen by the majority of a bargaining unit of the exclusive right to represent all employees in the unit is the assumption that the representative will act in the interest of all employees, and that any contract made will redound to the benefit of the employees equally. The statutory right to represent the entire craft thus carried with it a correlative duty to do so in good faith.

In *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, this Court recognized that the collective bargaining envisaged in the Railway Labor Act and similar statutes was to be in the interest of all members of the class, when it said (321 U. S., at 338):

> The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve

[12] It is to be borne in mind that the complaint in each case alleges that the Brotherhood was purporting to act as the representative of the craft under the Railway Labor Act (*supra*, pp. 3–4, 9). As to the legal situation had the Brotherhood sought to act only for its own members, see *infra*, p. 39.

> the welfare of the group. Its benefits and advantages are open to every employee of the represented unit * * *

The Railway Labor Act has been similarly interpreted. The Emergency Board referred to in this Court's opinion in *General Committee v. Southern Pacific Co.*, 320 U. S. 338, 340, 342–343n, declared in 1937:

> When a craft or class, through representatives chosen by a majority, negotiates a contract with a carrier, all members of the craft or class share in the rights secured by the contract, regardless of their affiliations with any organization of employees. * * * the representatives of the majority represent the whole craft or class in the *making* of an agreement for the benefit of all, * * *

And the National Mediation Board itself has given recognition to the same principle, stating:[13]

> Once a craft or class has designated its representative, such representative is responsible under the law to act for all em-

[13] National Mediation Board, *In the Matter of Representation of Employees of the St. Paul Union Depot Company*, Case No. R–635. This was the decision set aside in *Brotherhood of Railway & Steamship Clerks* v. *United Transport Service Employees*, 137 F. (2d) 817 (App. D. C.), reversed on jurisdictional grounds, 320 U. S. 715. The Court of Appeals was of the opinion that this principle not only required a representative to act in behalf of all the employees in the bargaining unit, but that an organization which excluded a minority from membership had no standing to represent it. See p. 37, *infra*.

ployees within the craft or class, those who are not members of the representatives' organizations as well as those who are members.

The consequences of allowing a majority, through its representative, to discriminate against other members of the unit, would leave the minority with no means of safeguarding its interests. As the instant cases show, this means not merely that the minority may be subjected to less favorable working conditions but that its right to earn a living in that occupation may be completely destroyed. Where the minority is also prevented from participating in the formulation of policies for the unit as a whole by exclusionary conditions of membership, there would remain no peaceful means of self-protection available to it.[14]

Although there is no express mention of this particular problem, we think that the language and history of the Railway Labor Act and related legislation show that Congress has never contemplated that the majority rule provisions could be used to bring about discrimination against minorities in the bargaining unit.

1. The Terms of the Act

"Representative."—Section 2, Fourth, declares that the majority of the craft shall have the right

[14] We are not concerned in these cases with discrimination against members of a unit who participate in the democratic processes of determining the policy of the majority organization (see pp. 34–36, *infra*).

to declare who shall be its "representative". Section 1, Sixth, defines "representative" as meaning "any person or * * * labor union * * * designated either by a carrier or group of carriers or by its or their employees, to act for it or them."

The use of the word "representative" in the majority rule provisions of the Act and the context in which it is found clearly import that the "representative" is to act on behalf of all the employees whom, by virtue of the statute, it represents. The definition adopts the word in its customary sense; the organization chosen is to act *for*, not against, the employees it represents. Since under the Act it is the representative of the entire unit and not merely of a portion of it, it must act on behalf of all the workers in the unit and not merely some of them. This is confirmed by the exclusive character of the representative's status. As we have shown (*supra*, pp. 15–18), individuals and minority groups in the craft are deprived by the Act of the right of separate representation for collective bargaining purposes. Clearly, Congress would not have so incapacitated them from advancing their own interests without imposing on the craft representative a duty to serve on behalf of the craft as a whole, and not merely for the well-being of certain portions of it favored as a result of discrimination against others of the craft.

This does not mean that the statutory representative is barred from making contracts which have unfavorable effects on some of the members of the craft or class represented. Differentiation between employees on the basis of type of work they perform or their competence and skill is, of course, permissible. Railroad labor contracts commonly include seniority provisions which afford preferential treatment to senior men, and mileage limitations which, on the other hand, protect junior members. In so far as seniority is concerned, each man has an equal opportunity to advance in rank. A junior worker has an interest in the security of those senior to him, since eventually he may receive similar benefits. Such familiar arrangements, even where they seem to discriminate against some members of the craft, look to the long-range benefits of the entire class and are properly aimed at serving "the welfare of the group" (*Case* decision, *supra*, 321 U. S. at p. 338). They are therefore within the scope of representative activity. But when an organization seeks and enters into an agreement with the deliberate purpose of discriminating against one portion of the craft and in favor of another, it is not acting as a "representative" as that term is used in the Act. Particularly is this so when the discrimination is based upon race, for then it cannot be said to result from economic considerations applicable throughout the craft.

"For the purposes of this Act". The term "representative" is used repeatedly in Section 2 in conjunction with the phrase "for the purposes of this Act" (Section 2, Third, Fourth, Ninth). Those provisions which deal with collective bargaining through representatives have as their purpose the avoidance of "any interruption to commerce or to the operation of any carrier engaged therein" (Section 2).[15] This aim is sought to be achieved by encouraging "the prompt and orderly settlement of all disputes concerning rates, of pay, rules, or working conditions" (*id.*). As this Court has recognized, the theory which underlies this reliance upon "voluntary processes"[16] was that transportation service would not be interrupted by strikes where the parties, acting without coercion through their own representatives, reached "agreements satisfactory to both". *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 569. In so far as the employees are concerned, the basis for their willingness to abide by any settlement is their confidence that their representatives are acting

[15] See also *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 565:

"* * * The Brotherhood insists, and we think rightly, that the major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes.'"

[16] *General Committee* v. *M.-K.-T. R. Co.*, 320 U. S. 323, 337.

whole-heartedly in their interests. Manifestly, this purpose is frustrated where a substantial minority of the craft know at all times that their economic aims are to play no part at the conference table, that the end result of the bargaining process will not reflect in any way their own needs.[17] If such a situation is permitted to prevail, the minority will be forced to accede or to rely on strikes as the only means remaining for their protection. Indeed, the execution and enforcement of contracts aimed directly at forcing them out of employment can only operate as a direct provocation to the activities disruptive of commerce which the Act is designed to eliminate.[18]

"Bargain collectively."—The representative is the agent through whom the employees are to

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[17] See the comment of the House Committee on the majority rule provisions of the National Labor Relations Act (H. Rep. No. 1147, 74th Cong., 1st Sess., p. 20):

"It would be undesirable if this basic scale should result from negotiation between the employer and unorganized individuals or a minority group, for the agreement probably would not command the assent of the majority and hence would not have the stability which is one of the chief advantages of collective bargaining."

The argument applies with only slightly diminished force where, as here, the agreement lays no basis for commanding the assent of the minority.

[18] See the comment of the New Jersey Court of Errors and Appeals in *Cameron* v. *International Alliance etc.*, 118 N. J. Eq. 11, 26, 176 A. 692, 701: "The inevitable results are the loss of the services of useful members of society, and unrest, discontent and disaffection among the workers so restrained * * *."

"bargain collectively." Collective bargaining implies that the bargain is to be in behalf of the entire unit which is a party to the negotiation, not in the interests of portions of the unit, whether individuals or minority or majority groups. That it was understood that the agreements would apply to the entire class of employees appears from the provision in Section 2, Seventh, that the working conditions which were not to be changed without notice and a conference between representatives were those of the "employees, *as a class* as embodied in agreements". [Italics supplied.]

2. The History of the Act

That these words and phrases, used in the provisions of the Act establishing the principle of majority rule, were designed to express the concept of good faith representation for all members of the unit appears from their legislative background.

Although the principle of majority rule was given governmental recognition by the Railroad Labor Board created by Title III of the Transportation Act of 1920,[18] the meaning of the doctrine in respects pertinent here did not come into question until 1934, when attempts were first made to give it binding legal effect. During that year the Railway Labor Act amendments, which first

[18] Decision No. 119, 2 Railroad Labor Board, pp. 87, 96.

directly embodied the principle in a federal statute, were enacted, and the problem as to the meaning of majority rule was considered by the agencies administering Section 7 (a) of the National Industrial Recovery Act.[20]

The legislative proceedings relating to the Railway Labor Act itself do not shed light on the issue here presented—whether the majority representative is under an obligation to act on behalf of all the members of a craft in good faith. The absence of any recognition that such a problem existed may have resulted from a legislative assumption that the agreement entered into by the craft representative would apply to all members in the unit without discrimination.

That this was probably the case is indicated by the contemporaneous history of Public Resolution No. 44 (48 Stat. 1183), which dealt with the administration of Section 7 (a) of the National Industrial Recovery Act, and by that of the National Labor Relations Act. This Court has properly recognized from the beginning that the majority rule provisions of the latter Act and of the Railway Labor Act were intended to have the same meaning. Compare *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, with *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44–45; *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, with

[20] (48 Stat. 198).

Order of Railroad Telegraphers v. *Railway Express Agency*, 321 U. S. 342. The material manifesting the intention of the Congress in the National Labor Relations Act is thus pertinent.

Section 7 (a) of the National Industrial Recovery Act, adopted June 16, 1933, provided that every code of fair competition should recognize the right of employees to "bargain collectively through representatives of their own choosing" (48 Stat. 198). During the first year of the administration of that Act, there was considerable difference of opinion as to the rights which this provision gave the majority of the employees in a bargaining unit.[21] In the spring of 1934 Senator Wagner introduced the forerunner of the National Labor Relations Act (S. 2926, 73rd Cong., 2d Sess.). The bill, as reported out of the Senate Committee, contained a provision for majority rule when the Board so decided (Sec. 10 (a)). The proposed bill was not passed. In its stead Congress enacted Public Resolution No. 44 (48 Stat. 1183), which authorized the President to establish boards to decide controversies under Section 7 (a). The resolution was approved by the President on June 19, 1934, 2 days before he ap-

[21] The principle of majority rule was apparently recognized by the National Labor Board but not by General Johnson and General Counsel Richberg of the National Industrial Recovery Administration. For a discussion of the problem during this period, see Lorwin and Wubnig, *Labor Relations Boards* (Brookings Institution, 1935), pp. 109–113, 268–272.

proved the Railway Labor Act of that year. Acting pursuant to this resolution, the President established the first National Labor Relations Board on June 29, 1934.

The Board thus established had occasion early in its history to make a complete examination of the question of majority rule. In *Matter of Houde Engineering Corp.*, (National Labor Relations Board (old) Decisions, July 9, 1934–June 1935, p. 35, decided August 30, 1934), the Board reviewed the history of the question (pp. 40–43), referring specifically to the recently enacted Railway Labor Act (p. 43), and firmly adopted the majority rule principle as applicable to the industries over which it had jurisdiction. But in taking this action, the Board was careful to point out "the limits beyond which it does not go" (p. 43). It held (p. 44):

> Nor does this opinion lay down any rule as to what the employer's duty is where the majority group imposes rules of participation in its membership and government which exclude certain employees whom it purports to represent in collective bargaining * * * or where the majority group has taken no steps toward collective bargaining or has so abused its privileges that some minority group might justly ask this Board for appropriate relief.

One year later, Congress passed the National Labor Relations Act, and gave sanction to the action of the first National Labor Relations Board

in the *Houde* decision in applying the majority principle of the Railway Labor Act to other industries subject to Federal authority. In doing so, it made clear its intention to protect the rights of minority groups.

The House Committee (H. Rep. No. 1147, 74th Cong., 1st sess. pp. 20–21), cited and quoted the *Houde* case with approval, and stated:

> There cannot be two or more basic agreements applicable to workers in a given unit; this is virtually conceded on all sides. If the employer should fail to give equally advantageous terms to nonmembers of the labor organization negotiating the agreement, there would immediately result a marked increase in the membership of that labor organization. On the other hand, if better terms were given to nonmembers, this would give rise to bitterness and strife, and a wholly unworkable arrangement whereby men performing comparable duties were paid according to different scales of wages and hours. Clearly then, there must be one basic scale, and it must apply to all.
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> * * * * *
>
> Since the agreement made will apply to all, the minority group and individual workers are given all the advantages of united action. * * * agreements more favorable to the majority than to the minority are impossible, for under section 8 (3) any discrimination is outlawed which tends to

> "encourage or discourage membership in any labor organization."

The report then states (p. 22) that the principle of majority rule had been applied under Public Resolution No. 44, and "written into the statute books by Congress in the Railway Labor Act of 1934", thereby demonstrating that the Committee regarded the Railway Labor Act and the proposed bill as having the same meaning. The Senate Committee in charge of the bill, after pointing out that the majority rule had previously been incorporated in the Railway Labor Act, reported that (S. Rep. No. 573, 74th Cong., 1st Sess., p. 13):

> * * * majority rule, it must be noted, does not imply that any employee can be required to join a union, except through the traditional method of a closed-shop agreement, made with the assent of the employer.[22] And since in the absence of such an agreement the bill specifically prevents discrimination against anyone either for belonging or for not belonging to a union, *the representatives selected by the majority will be quite powerless to make agreements more favorable to the majority than to the minority.* [Italics supplied.]

It would be difficult to find words more clearly condemning action on the part of a representative

[22] As has been noted, the one exception to the requirement of equal protection recognized in the National Labor Relations Act, the closed-shop contract, is expressly banned in the Railway Labor Act by Section 2, Fourth and Fifth. See 40 Op. A. G., No. 59, December 29, 1942.

directed to the exclusive benefit of its own members.

"Majority rule is at the basis of our democratic institutions." (H. Rep. No. 1147, 74th Cong., 1st sess., p. 21.) It was on this premise that Congress adopted the principle of majority rule in labor relations. The Report on the National Labor Relations Act noted at the same time that "the underlying purposes of the majority rule principle are simple and just" (*id.* p. 20), and that it is "sanctioned by our governmental practices, by business procedure, and by the whole philosophy of democratic institutions" (S. Rep. No. 573, 74th Cong., 1st sess., p. 13), under which the individual elected to office administers his trust after his election for the benefit of all, not merely for those who voted in his favor.[23] In the application of these democratic principles to the "orderly government of the employer-employee relationship" (*National Labor Relations*

[23] At the 1934 hearings on the Railway Labor Act (Hearings before the House of Representatives Committee on Interstate and Foreign Commerce, on H. R. 7650, 73rd Cong., 2nd Sess., pp. 33–34) Coordinator of Transportation Eastman said, "If a majority of the people, even a plurality, select a Congress, that is the kind of a Congress they get and that sits until the next election, when those in the minority have a chance to convert the others to their way of thinking. The same way with labor unions. * * * The will of the majority ought to govern; but there ought to be ample means so that the minority can have a chance to persuade others to their way of thinking and so that there can be an election, if they succeed in converting their minority into a majority."

Board v. Highland Park Manufacturing Co., 110 F. (2d) 632, 638 (C. C. A. 4)), the same "simple and just" requirements should prevail.

It thus appears that in fixing the exclusive right of representation in the organization selected by the majority in a bargaining unit Congress assumed that this meant that the representative would act in behalf of all the employees in the unit. Although Congress recognized that the minority was being deprived of pre-existing rights to act independently, this was justified on the ground that minorities and individuals would obtain all the advantages of the united action. Clearly Congress did not intend its grant of exclusive authority to result in discrimination against individuals or minorities. The history of the Act, taken together with the repeated use of the word "representative," with its normal connotation, and the statutory purpose of avoiding industrial strife through acceptance of the employees of decisions made by freely chosen agents acting on their behalf, all support a construction of the Act as requiring the representative of all the employees in a unit in fact to represent all—to act on behalf of all equally and in good faith.

This interpretation of the statute also finds support in the principle that a law should, if possible, be construed in a constitutional manner, or in a way which will avoid serious consti-

tutional difficulties. The harm resulting from discrimination by a statutory bargaining representative is not the injury which is done a principal by a faithless agent in the realm of private law. Here the agency rests not on the consent of the minority but on the command of Congress. An issue might well arise as to whether a law which subjected a minority to the unrestrained will of the competing majority and the employer, with no opportunity to protect its own interests, was an arbitrary deprivation of liberty without due process of law. Compare *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311.[24] If the statute were construed to permit such a discrimination because of race, it would also run counter to "our constitutional policy" against discrimination because of race or color. Compare *Mitchell* v. *United States*, 313 U. S. 80, 94.

C. ASSUMING THE TRUTH OF THE ALLEGATIONS OF THE COMPLAINTS, THE BROTHERHOOD, WHILE PURPORTING TO ACT AS REPRESENTATIVE OF ALL MEMBERS OF THE CRAFT OF FIREMEN, IS DISCRIMINATING AGAINST NEGRO FIREMEN

We have shown that the grant of the exclusive right of representation to the organization chosen by the majority of the craft presupposed that the representative would act in behalf of all the members of the craft in good faith. On the basis of the allegations of the complaints, it is clear that

[24] The authority of the *Carter* case on this proposition has not been impaired.

the Brotherhood has not fulfilled this obligation. It has discriminated against colored firemen both in the bargaining process and in its membership requirements. On the facts alleged (No. 37, R. 7–10; No. 45, R. 88–91), which are necessarily admitted by the filing of motions to dismiss, the Brotherhood, in securing the contracts, was "intending and contriving to secure a monopoly of employment and the most favorable jobs for its own members" (No. 37, R. 10); indeed its object was to force colored employees out of service completely (No. 37, R. 7–8, 10; No. 45, R. 88). The Brotherhood exerted every effort to advance the white firemen over the colored so as to deprive the latter of the positions and earnings to which their competence and seniority would otherwise entitle them (No. 37, R. 7–8; No. 45, R. 87–88). Petitioners Tunstall and Steele were compelled to accept inferior jobs, and Steele forced to quit work completely, because of this policy (No. 37, R. 10–11; No. 45, R. 92–93). It can hardly be claimed in these circumstances that the Brotherhood was acting on behalf of the Negro members of the craft.

The discrimination in these cases is aggravated by the fact that the colored employees have no opportunity to participate in the formulation of the policies which the Brotherhood maintains as the representative of the entire craft. For they may not become members of the Brotherhood and

may not take part in its deliberations. Thus they do not share in the protection against arbitrary or discriminatory action which is available to members of the organization. The officials of labor organizations which have achieved representative status under the National Labor Relations Act or the Railway Labor Act are to a large extent guided by the views of the members of the organization for which they speak. The latter have ultimate power to approve or disapprove. An individual employee who is a member of the representative union can go to meetings, participate in discussions, and obtain a hearing for his viewpoint. Even if his arguments do not prevail, the existence of such a forum in which the negotiators for the craft can be called to account has a tendency to avert arbitrary, unreasonable, or discriminatory action, and normally insures that such action will not be taken. Similarly, an employee who is not, but could if he chose be, a member of the union cannot complain of his own failure to take part in the deliberations which are to affect his working conditions. Moreover, he is a member of the group to which the union looks for support to maintain its status as statutory representative. Where, however, a union excludes a minority of the craft from membership, these ordinary controls upon the process of collective bargaining cannot benefit the excluded groups. In such a case the majority representa-

tive may feel free to ignore the interests of the minority, as is here alleged.[25]

Certainly where an organization enters into agreements for the purpose of discriminating against employees in the bargaining unit who are not permitted to become members, it cannot be

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[25] The National Labor Relations Board has stated (*Matter of Bethlehem-Alameda Shipyard, Inc.*, 53 N. L. R. B. 999, 1016):

"We entertain grave doubt whether a union which discriminatorily denies membership to employees on the basis of race may nevertheless bargain as the exclusive representative in an appropriate unit composed in part of members of the excluded race. Such bargaining might have consequences at variance with the purposes of the Act."

In the *Bethlehem-Alameda* case, it was originally contended that the Board should not entertain a union's petition for certification as representative of the employees in a collective bargaining unit because the unit included Negroes who were allegedly excluded from membership in the petitioning union. It appeared, however, that subsequent to the hearing before the Board the petitioning union had made adjustments which the Board construed as expressing (53 N. L. R. B. at 1016) "a purpose on the part of the Council to accord to the Negro auxiliary locals the same rights of affiliation and representation as it accords to its other affiliated locals." On the assumption that the union would comply with that policy, the Board found it no longer necessary to decide the question first presented. In *Matter of Larus & Brother Co., Inc.*, Cases Nos. 5–R–1413, 5–R–1437, the National Labor Relations Board has ordered a certified organization to show cause why the certification should not be set aside on the ground, alleged by another union, that it does not admit Negro members of the unit to equal membership or bargain in their behalf as part of the unit.

said to be acting in good faith as the representative of the entire craft.[26]

[26] The only prior decision on this point under the Railway Labor Act held that Congress never intended such "an intolerable situation" as to "force upon any class of employees representation through an agency with whom it has no affiliation nor right of association." *Brotherhood of Railway & Steamship Clerks* v. *United Transport Service Employees*, 137 F. (2d) 817, 821–822 (App. D. C.). In that decision, which was reversed in this Court on jurisdictional grounds (320 U. S. 715), Chief Justice Groner, concurring, declared: (137 F. (2d), at 821–822):

"* * * the effect of the action of the Board is to force this particular group of employees to accept representation by an organization in which it has no right to membership, nor right to speak or be heard in its own behalf. This obviously is wrong and, if assented to, would create an intolerable situation. That the rules of the Brotherhood make negroes ineligible to membership is not a matter which concerns us, but that the Brotherhood, in combination with the employer, should force on these men this proscription *and at the same time insist that Brotherhood alone is entitled to speak for them* in the regulation of their hours of work, rates of pay and the redress of their grievances is so inadmissible, so palpably unjust and so opposed to the primary principles of the Act as to make the Board's decision upholding it wholly untenable and arbitrary. The purpose of the Act, as is apparent on its face, and as has been recognized and confirmed by the Supreme Court and this Court in many decisions, is to insure freedom of choice in the selection of representatives. While it is true that this purpose has been held to yield, when necessary, in the interest of uniformity of classification in accordance with established custom, *nothing in the Act nor in its construction by the courts can be found to justify such coercive action as to force upon any class of employees representation through an agency with whom it has no affiliation nor right of association.* It is, therefore, of no consequence that the porters were at one time dependent upon Brotherhood as their spokesman with

This does not mean that a labor union as a private organization has no power to fix its own eligibility requirements, even if the result is to discriminate against persons because of their race. As long as the organization is acting solely in a private capacity, no legal objection may be made. But here the Brotherhood is exercising, and insisting upon exercising, the right granted by the Railway Labor Act to act as the exclusive representative of the entire craft of firemen. To the extent that the Brotherhood claims rights under the statute, it must carry out the duties which are inseparable from those rights. It cannot at the same time claim to be the statutory representative of all the employees in the craft and refuse to represent some of them. If it adopts the latter course, as is the case here, it does not follow that its discriminatory eligibility rules are illegal, but that while it fails to act in good faith on behalf of all the members of the craft it may not exercise the right to act as the statutory representative of the craft. It is relegated to the

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the railroad, for that never was a trusteeship of their own making. To perpetuate it by law would be to impose a tyranny, in many respects analogous to 'taxation without representation.' And if anything is certain, it is that the Congress in passing the Act never for a moment dreamed that it would be construed to diminish *the right of any citizen to follow a lawful vocation on the same or equal terms with his neighbor.* In this view, to enforce the Board's decision would be contrary to both the word and spirit of our laws." [Italics supplied.]

capacity of a purely private organization, with the right to bargain on behalf of its own members only so long as no other statutory representative is designated.[27]

An organization which is thus debarred from acting as exclusive bargaining agent under the statute might still bargain for its own members, if no other organization is chosen by a majority of the employees and if the carrier permits it to do so. But in that capacity it would have no exclusive rights, and no power to represent anyone else. The carrier would not be bound to bargain with it at all, and could not bargain with it for the entire craft. The colored employees in the class would be able to choose a different organization to act on their behalf and the carrier would be required to give that organization equal status; that is, if it bargained with one organization as representative for its members only, it would have to grant any other organization which requested it equal recognition.[28] See *Matter of*

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[27] It is unnecessary to consider whether, in the absence of any statutory provisions, a union may enter into an agreement with an employer covering employees who do not and cannot belong to the union. Assuming that it can, since passage of the Railway Labor Act only a representative selected by the majority of a bargaining unit may bargain on behalf of the unit, and then only so long as it acts in good faith for the unit as a whole.

[28] This does not mean that the colored employees should be segregated in a separate bargaining unit. The National Mediation Board has stated its views as follows: "The Board has definitely ruled that a craft or class of employees

Berkshire Knitting Mills, 46 N. L. R. B. 955, 988
989, enforced in *Berkshire Knitting Mills*
National Labor Relations Board, 139 F. (2d
134 (C. C. A. 3), certiorari denied May 22, 1944
Matter of the Carborundum Co., 36 N. L. R. B
710, 731.

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may not be divided into two or more on the basis of ra
or color for the purpose of choosing representatives. A
those employed in the craft, or class regardless of race, creed
or color, must be given the opportunity to vote for the repre
sentatives of the whole craft or class." National Mediatio
Board, *The Railway Labor Act and the National Mediatio
Board* (August 1940), p. 17. The National Mediatio
Board has on several occasions refused to separate a minorit
of white persons from a craft a majority of whose member
were colored. See *In the Matter of Representation of Em
ployees of the Atlanta Terminal Co.*, Case No. R-75; *In th
Matter of Representation of Employees of the Central o
Georgia Railway Co.*, Case No. R-234. The National Labo
Relations Board has also often held that: "The color or rac
of employees is an irrelevant and extraneous considerati
in determining, in any case, the unit appropriate for th
purposes of collective bargaining." (*Matter of U. S. Bed
ding Company*, 52 N. L. R. B. 382, 388.) See also *Matte
of The American Tobacco Company*, 2 N. L. R. B. 198
Matter of Union Envelope Company, 10 N. L. R. B. 1147
1150–1151; *Matter of Brashear Freight Lines, Inc.*, 1
N. L. R. B. 198, 201; *Matter of Crescent Bed Company*, 2
N. L. R. B. 34, 36; *Matter of Georgia Power Company*, 3
N. L. R. B. 692; *Matter of Hughes Tool Co.*, 33 N. L. R. B
1089, 1097–1099; *Matter of Aetna Iron & Steel Co.*, 3
N. L. R. B. 136; *Matter of Southern Wood Preserving Com
pany*, 37 N. L. R. B. 25, 28; *Matter of Tampa Florid
Brewery, Inc.*, 42 N. L. R. B. 642, 645–646; *Matter of South
ern Brewing Company*, 42 N. L. R. B. 649, 652–653; *Matte
of Columbian Iron Works*, 52 N. L. R. B. 370, 372, 374.

II. The Courts Have Jurisdiction To Enjoin a Union From Acting as Statutory Representative, and an Employer From Bargaining With it as Such, so Long as it Fails To Act Without Discrimination on Behalf of all the Members of the Craft.

In Point I we have contended that the provisions of the Railway Labor Act which provide for representation of a craft by the person or organization selected by the majority impose upon the craft representative a duty to act in behalf of all members of the craft in good faith. The question remains whether a minority has any remedy when the craft representative violates this obligation.

Inasmuch as the exclusive right of the majority representative and the duty to represent in good faith are created by the Railway Labor Act, a suit to enforce compliance with that obligation, whether by injunction or declaratory judgment, lies (unless the Railway Labor Act itself forbids) within the "original jurisdiction" of the federal courts over "suits and proceedings arising under any law regulating commerce". 28 U. S. C. Section 41(8). The cause of action in the *Tunstall* case thus "clearly had its origin [in] and is controlled by" the Railway Labor Act, and this is sufficient. *Peyton* v. *Railway Express Agency*, 316 U. S. 350; *Mulford* v. *Smith*, 307 U. S. 38, 46. In the *Steele* case, this Court may review the decision of the Supreme Court of Alabama under Section 237 (b) of the Judicial Code be-

cause a "right * * * is * * * claimed * * * under the Constitution" and a "statute of * * * the United States." Obviously the enforcement of duties created by the Federal Act should not be left exclusively to the state courts. Furthermore the ordinary requisites of equity jurisdiction and for the issuance of declaratory judgments are clearly present.

In the series of cases decided last term,[29] however, this Court narrowly circumscribed the situation in which the federal courts could take jurisdiction of cases involving the Railway Labor Act. We discuss briefly the application of these decisions to the case at bar.

A. These decisions were in large part predicated on the view that Congress intended controversial problems in the field of railroad labor relations to be resolved by the administrative agencies established by the Act[30] or voluntarily by "the traditional instruments of mediation, conciliation and arbitration" (320 U. S., at 332) without judicial intervention. Each of the cases was regarded as involving a "jurisdictional dispute",

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[29] *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297; *General Committee* v. *M.-K.-T. R. Co.*, 320 U. S. 323; *General Committee* v. *Southern Pacific Co.*, 320 U. S. 338; *Brotherhood of Railway & Steamship Clerks* v. *United Transport Service Employees*, 320 U. S. 715, 816.

[30] Compare *Switchmen's Union* and *Brotherhood of Railway Clerks* cases, *supra*.

which the Court thought to be determinable under the statutory scheme.

The reasoning that such matters should not be submitted to the judiciary would not seem applicable to the instant cases. For these cases involve no dispute as to who has been designated to represent the craft; all concede that the Brotherhood has been chosen as bargaining representative by the majority of the craft of firemen. Nor do the cases concern the drawing of a line between the functions of the representatives of various crafts. Only the single craft of firemen is involved. The National Mediation Board lacks the power which the National Labor Relations Board exercised in the *Wallace* cases to protect a minority in a craft from discriminatory terms of employment fixed in a contract negotiated by a union acting as their representative. Inasmuch as the interpretation of a contract is not involved, the cases do not fall within the jurisdiction of the National Railroad Adjustment Board. And disputes between a representative and employees in the craft are not covered by the provisions of the Act for mediation, arbitration or voluntary conciliation. Indeed they cannot be subject to those processes, which assume that employees will be heard through "representatives" (Sections 2, Second; 2, Sixth; 5, 6, and 7), since the controversy here is between individuals and minority groups in a craft who have no statutory repre-

sentative apart from the party acting adversely to their interests. Inasmuch as the Brotherhood is, according to the allegations of the complaint, seeking to drive the colored employees off the railroads, it would seem futile to refer the matter to conferences between the Brotherhood and the Negro firemen for a voluntary settlement; the Act certainly makes no provision for this type of conciliation.

Assuming the truth of the allegations, it is thus apparent that the petitioners are remediless unless the courts are open to them. We do not think that Congress intended that a minority should be completely helpless in case of disregard by the statutory representative of its duty to act in behalf of the entire craft. There is no suggestion in the history of the Railway Labor Act that Congress affirmatively desired to deprive minorities of the judicial protection which would otherwise be available as their sole means of enforcing their right to fair representation. In the absence of any such showing, the normal presumption would be that Congress wished that this right might be preserved in the customary manner, through the courts to which resort should be available to insure compliance with the laws of the United States.

It is, of course, true that the Act nowhere expressly authorizes the courts to decide such matters, and that there is language in the opinions of

last term which suggests that, apart from special situations previously recognized,[31] the courts lack jurisdiction under the Act except where Congress expressly otherwise declares. But this Court did not then have in mind the present problem, with the consequence of the absence of a remedy and the unlikelihood that Congress would have intended the principle of majority rule to be used as an instrument for discrimination against minority employees. The Court has often recognized "that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used" for the reason that while "the question actually before the Court is investigated with care, and considered in its full extent", the possible bearing of a decision "on all other cases is seldom completely investigated." *Cohens* v. *Virginia,* 6 Wheat. 264, 399, 400; *Humphrey's Executor* v. *United States,* 295 U. S. 602, 627.

B. 1. These cases may come within the reasoning of the same exception to the doctrine of last term's decisions as the *Texas & New Orleans* and *Virginian* cases. In the *Switchmen's Union* case (320 U. S., at 300), the Court declared that the purport of those leading authorities was that:

> If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration

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[31] *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548; *Virginian Ry. Co.* v. *System Federation,* 300 U. S. 515; *Shields* v. *Utah Idaho Central R. Co.,* 305 U. S. 177.

> of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control.

See also *Stark* v. *Wickard*, 321 U. S. 288, 307. Just as the statutory right to collective bargaining might have been unenforceable without legal sanctions, so the duty imposed by the Act on the craft representative to act fairly on behalf of the employees represented would be meaningless if the courts are denied jurisdiction to enforce it. This duty, as has been shown *supra*, pp. 23–24, is inherent in the doctrine of majority rule. It too goes to the heart of the statutory scheme. For the theory of preserving industrial peace through bringing representatives of the disputing parties into agreement rests upon the assumption that their principals will be satisfied that the representatives have been acting fairly in their behalf.

2. The cases may be brought within the right of action recognized in the *Texas & New Orleans* and *Virginian* cases in so far as they are actions against the employer. Unless the Brotherhood was the statutory representative of the carriers' employees, the carriers violated the Act when they recognized the Brotherhood as such representative and entered into collective bargaining agreements with it on behalf of all the employees. Certainly when such recognition is given by a carrier to an organization which is *not* the lawful representa-

tive of its employees the unqualified right of the employees to select their representative "without interference, influence, or coercion" (Section 2, Third of the Act) and to "bargain collectively through representatives of their own choosing" (Section 2, Fourth of the Act), has been denied them. Exclusive recognition of a labor organization which is not a statutory representative has been held an interference with employee rights under the National Labor Relations Act. *Cf. National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 271; *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 697 (dissent).[32] This is so because it imposes upon all in the unit an agent which is not its representative and handicaps the choice of a true representative; "once an employer has conferred recognition on a particular organization it has a marked advantage over any other in securing the adherence of the employees" (303 U. S. 261, 267). The grant of that advantage, therefore, constitutes support of its recipient, and is illegal except where required by law. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 556–557, 560; the *Virginian Ry.* case, *supra*, 300 U. S., at 548.

While the Brotherhood in these cases was discriminating against Negro firemen it was not en-

[32] Nothing in the majority opinion is inconsistent with the dissent on this point.

titled to act as the representative of the craft under the Act. A carrier accordingly had no right to recognize it as such, and under the doctrine of the *Texas & New Orleans* and *Virginian* cases the courts had jurisdiction to restrain a carrier from doing so.

C. The *Switchmen's Union* opinion implies that its limitation upon the scope of judicial power would not apply if "constitutional questions" were present. 320 U. S., at 301. Cf. also the dissent of Mr. Justice Frankfurter in *Stark* v. *Wickard*, 321 U. S., at 314. If the Act were construed as depriving a minority of the right to self-representation without imposing any duty on the representative of the entire craft to serve the minority's interests along with those of the craft generally, there would be serious question as to its constitutionality. Particularly is this so when the discrimination against the minority rests upon race. Cf. *Mitchell* v. *United States*, 313 U. S. 80, 94.[33] The due process clause would hardly permit Congress directly to provide that a minority of Negro employees must be represented exclusively through an organization which was acting in opposition to their interests because of their race.

We believe that Congress did not intend the

[33] "Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation." *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552, 561.

Act to have any such meaning. The consequences may be the same, however, if the majority representative is permitted to exercise the statutory right to appear and contract for the entire craft without any recourse being available to a minority group not fairly represented. The same factors, constitutional and otherwise, which support a construction of the Act as not depriving a minority of all substantive right in such circumstances negative the existence of an intention to leave the minority remediless. But if the Act be interpreted as denying to all courts jurisdiction to protect the right of the minority to fair representation, these cases might present a constitutional question which in itself would require judicial determination.

Respectfully submitted.

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APPENDIX

A

The pertinent provisions of the Railway Labor Act as amended in 1934, 48 Stat. 1185, 45 U. S. C., Section 151 *et seq.*, read as follows:

SECTION 1. When used in this Act and for the purposes of this Act—

* * * * *

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

* * * * *

GENERAL PURPOSES

SECTION 2. "(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or

application of agreements covering rates of pay, rules, or working conditions.

* * * * * *

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * * * * *

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, * * * or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization. * * *

* * * * * *

"Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate

order that such contract has been discarded and is no longer binding on them in any way.

* * * * * *

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

* * * * * *

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for

the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

* * *

B

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U. S. C., Secs. 151, *et seq.*) are as follows:

SEC. 8. It shall be an unfair labor practice for an employer—

* * * * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of

the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

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